



REPUBLIC OF KENYA



Wamalwa v Cooperative Bank of Kenya Limited (Employment and Labour Relations Cause 480 of 2019) [2025] KEELRC 1080 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1080 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 480 OF 2019**

MN NDUMA, J

APRIL 3, 2025

BETWEEN

EDWIN SIKUKU WAMALWA CLAIMANT

AND

COOPERATIVE BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed suit on 22/7/2019 seeking the following reliefs:-
 - a. A declaration that the termination of the Claimant's employment was both wrongful and unlawful and in breach of his contract of employment and is hence entitled to judgment on the claimed sum.
 - b. A declaration that the Claimant's right to privacy guaranteed under Article 31 of *the Constitution* of Kenya, 2010 and section 31 of the *Banking Act* was breached.
 - c. This honourable court be pleased to assess and award the general damages and exemplary damages for violation of the right to privacy.
 - d. Damages for loss of employment.
 - e. Compensation for unfair and unlawful termination and a certificate of service
 - f. An injunction restraining the respondent from harassing the Claimant, attaching the Claimant's property under the guise of recovering the money loaned.
 - g. Service pay
 - h. Compensation for unfair and unlawful termination; and
 - i. Costs of the suit and interest.



2. The terminal benefits sought include:-
 - i. One month salary in lieu of notice Kshs. 169,494.00
 - ii. Overtime worked at Kshs. 1,412.40 Kshs x 26 days x 12 months x 10 years Kshs. 4,406,844.00
 - iii. Service pay $(1/3 \times 169,494) \times 10$ Kshs. 564.00

Claimant's case

3. CW1 adopted the witness statement dated 30/04/2019 as his evidence in chief and produced documents in the list dated 30/4/2019 as exhibits 1 to 5.
4. The claimant says that on the 10th May, 2018 he received a show cause letter indicating that an internal audit carried out by the human resource division revealed that he had committed an act which amounted to gross misconduct by allegedly obtaining a loan by false pretences.
5. He testified that through a phone call, he was invited by bank security agent for interrogation in June 2018 and was asked why he had chosen Daphyl enterprises to supply furniture to him and responded that he was at liberty to acquire furniture from any vendor he deemed affordable.
6. That after response to the said show cause letter he received another show cause letter dated 11/7/2018 in which the Respondent alleged that the Claimant had refused to cooperate with internal investigators and was invited to a disciplinary hearing vide letter dated 15/08/2018.
7. The claimant testified that at the hearing, the security agent who had previously interviewed him was present in the disciplinary committee. That he was then invited for an early morning meeting by the department head on 12th September, 2018 where he was lumped up into a group of ten (10) people in one room and made to read pre-printed minutes. That his employment was terminated vide letter dated 10/10/2018 and the subsequent appeal was not successful.
8. The claimant says that he was unreasonably and unfairly required to comply with guidelines on staff loans retroactively and after the fact of procuring the items whose purchase he was financing with the staff loan.

Cross examination

9. Upon cross examination, he said that he was told that the terms and conditions of service were in the staff manual and he had agreed to be bound by them. That the loans were to be secured per the loan policy and the interest rate was 4 % per annum which would revert to commercial rates upon leaving the employment for reason other than retirement.

Defence case

10. RW1 Leah Ngetich gave sworn testimony and adopted the witness statement dated 27/6/2023 as her evidence in chief. She also produced the documents in the list dated 27/7/2020 as exhibits 1 to 33 and relied on the memo of reply as well as the counterclaim.
11. She testified that the claimant had over the period of his employment several disciplinary issues ultimately leading to his dismissal. That on the 11/6/2010 he was issued with a verbal warning for negligence in performance of his duties resulting in fraudulent immobilization of shares belonging to a customer of the Respondent. On the 18/2/2011 he was issued with another verbal warning for erroneous transfer of a customer's shares which exposed the Respondent to potential loss of funds



and on 23rd February 2016 he was given a warning following his duplication of UNAITA Sacco Link Debit Cards.

12. She testified that the claimant had committed an act that amounted to gross misconduct by making false entry in a document or official record to show that he had obtained a furniture loan and utilized it to purchase furniture whereas he diverted the funds for other use. That the claimant applied for a furniture loan of ksh. 300,000 which was disbursed to A/C 1148642924600 for a vendor by the name Daphyl Enterprises only for the same amount to be diverted to the claimant's cash account number 01103105458300 immediately thereafter for other use other than the intended purchase of furniture contrary to the provisions of the Respondent's staff manual which requires members of staff to utilize staff loans for intended purposes.
13. She testified that the claimant was issued with a show cause letter on the 10/5/2018 and he responded on the 22nd May 2018 and was accorded opportunity to be accompanied by representative at a disciplinary hearing but he chose not to be accompanied by one. That the claimant was heard and found to have violated the Respondent's staff manual on advancement of loans and code of conduct and ethics. That the claimant was terminated from employment and submitted an appeal which the Respondent responded to, upholding its decision to terminate.

Cross examination

14. Upon cross examination, she said that the code of conduct was in existence in 2018 and was not developed in 2020. That it was there from the inception of the bank and was being reviewed from time to time. That she did not see evidence of purchase of furniture. She said that she was not present during the disciplinary hearing and relied on the documents availed to her. She said that she was not part of the investigation and there was nothing unlawful done. That the claimant was not dismissed based on the verbal warnings but the warnings have consequences on subsequent disciplinary conduct.

Determination

15. The court has considered the pleadings, the evidence by the Claimant and the Respondent submissions by both of them and has delineated the following issues for determination:-
 - i. Whether the termination of the employment of the Claimant was for a valid reason following a fair procedure.
 - ii. Whether the Claimant is entitled to the reliefs sought
 - iii. Whether the Respondent has proved the counter claim as set out in the statement of defence.
 - iv. Whether the Respondent is entitled to the reliefs sought.

Analysis of the evidence and the law applicable

16. Facts not in dispute are that the Claimant was employed by Respondent on 24/7/2000 as graduate clerk. He worked at shares registry services. The Claimant was unionisable and terms of CBA applied to him. The Respondent's business code of conduct and Ethics, the staff manual in place and administrative circulars applied to him. The Claimant became permanent and pensionable on 25/1/2009. The Claimant became a support clerk by a letter dated 29/2/2009. On 15/10/2013, the Claimant was transferred to document's and voucher processing unit. He was later transferred to the account opening and card production unit on 28/1/2015 and later promoted to supervisory grade 2 with effect from 15/5/2017.



Termination

17. The Claimant was accused of gross misconduct in that he had made a false entry in a document or official record to show that he had obtained a furniture loan and utilized it to purchase furniture whereas he had diverted the funds to other purposes.
18. The evidence set out in the Notice to show cause was that the Claimant had applied for a furniture loan of Kshs. 300,000,000 which was disbursed to account no. 1148642924600 for a vendor by the name of Daphyl Enterprises but the same amount was diverted to the Claimant's cash account number 01103105458300 immediately thereafter contrary to the Respondent's, staff manual which requires members of staff to utilize staff loans for the intended purposes only.
19. That as a result of the conduct by the Claimant, the disbursed loan was not secured as the security for the loan is vested on the asset being purchased thereby exposing the bank to potential loss and putting his integrity as a bank employee into question in contravention of the provision of the bank's staff manual and the business code of conduct and ethics. That the loans are given at preferential interest rates and pays for fringe benefits tax to bridge the difference of the interest as required by the Kenya Revenue Authority and hence insists on full disclosure to avoid legal liability and unnecessary expenditure.
20. That the first show cause letter dated 10/5/2018 was issued to the Claimant and further investigations were conducted upon response by the Claimant to the letter. The Claimant was then issued with a second notice to show cause dated 11/7/2018 with an additional charge of knowingly failing or refusing to obey a lawful and proper command for failing to co-operate with the investigators during the investigations contrary to the provision of clause 16.0 of the Bank's code of conduct and ethics. The Claimant responded to the show cause letter on 22/5/2018 and 18/7/2019 denying these charges.
21. The Claimant was then invited to appear before the Respondent's disciplinary hearing panel on 29/8/2018 where he was afforded opportunity to be accompanied by a representative. The Claimant did not bring a representative.
22. Upon hearing, the disciplinary panel found the Claimant guilty of gross misconduct and recommended summary dismissal of the Claimant from employment of the Respondent. The Respondent found that the Claimant had occasioned breach of trust and integrity by his conduct in violation of section 28.9 (vii, viii- xv and xxv, xxvi; and xxx) of the staff manual.
23. That Claimant appealed against the dismissal by a letter dated 10/10/2018 to which the Respondent replied by a letter dated 30/10/2018 in which the Respondent upheld the decision of the disciplinary panel.
24. The Respondent stated that the Claimant was a member of registered pension scheme under the relevant benefit Act, hence was not entitled to service pay. That the dismissal was for a valid reason following a fair procedure and so the Claimant is not entitled to compensation or any other relief.
25. The Respondent added overtime claims are brought not later than 2 months upon overtime being utilized. That the Claimant had not brought such a claim and 9 months had lapsed contrary to the Respondent's overtime policy. That the Claimant was after all a management staff and was therefore not entitled to overtime.
26. It is not in dispute that the Claimant earned a basic salary of Kshs. 169,494.00 per month at the time of dismissal. That the Claimant was paid all dues he was entitled to upon dismissal and is not entitled to the reliefs sought.



27. The Claimant on the contrary states that he did not commit any misconduct in that he had sold old furniture to Dabhyl Enterprises which was in the business of buying and refurbishing old furniture at Kshs. 68,500.00 which was deposited into the Claimant's personal account. The Claimant further argued that he had not made any misrepresentation to the bank nor applied the loan facility extended to him to a wrong purpose. That the bank had violated his right to privacy and had subjected him to unfair procedure by subjecting him to two notice to show cause letters and did not give him a hearing at the initial disciplinary hearing and at appeal level. That the disciplinary panel was composed of one of the persons who had conducted investigation on the matter and so was not impartial. That for these reasons the court should find that the dismissal was unlawful and unfair.
28. The court was referred by the Claimant to the case of Kennedy Kimayo Kiplagat versus Cooperative Bank of Kenya Ltd [2018] eKLR where it was held:
- "The Claimant frontally raises issues with the composition of the disciplinary committee. It comprised of parties who were also involved in the procurement of the good and materials leading to this dispute. He submits a case of conflict of interest on the part of Anthony Mburu and Samuel Birech. This is again not addressed by the Respondent. I find that the conflict of interest complained of by the Claimant was fatal to the conduct of such proceedings. The issue of fairness was compromised and therefore the Claimant has every reason to complain of unfair termination of employment. This is aggravated by the Respondent's reaction to his appeal. No action: dead silence."
29. The court finds that the Respondent had no reason to frame the Claimant with false accusation having natured him and promoted him fairly quickly to supervisory rank despite receipt of several verbal warnings for various violations along the way. The court is of the view that the loan disbursed to the Claimant to be paid to Daphyl Enterprises in the sum of Kshs. 300,000.00 was not paid to Daphyl account but was instead diverted to Claimant's personal account and there was no evidence that the money had been applied wholly for the intended purpose for purchase of furniture.
30. The explanation given by the Claimant was not satisfactory despite the Respondent having given the Claimant opportunity to explain himself.
31. The court finds that the Respondent satisfied the requirements under section 41, 43 and 45 of the *Employment Act*, 2007 by convening a disciplinary panel, upon being dissatisfied by the Claimant's written responses to the notices to show cause. The issuance of the 2nd notice to show cause to add additional charge after investigation did not negate the process.
32. The Respondent demonstrated to the satisfaction of the court that it had a valid reason to dismiss the Claimant from employment. The Respondent further demonstrated that it had followed a fair procedure in establishing that the Claimant was guilty for gross misconduct and therefore was amenable to summary dismissal in terms of section 44 of the *Employment Act* 2007.
33. The court therefore concludes that the summary dismissal of the Claimant from employment was lawful and fair. The Claimant is therefore not entitled to compensation or damages as prayed.
34. With regard to the claim for terminal benefits, the Claimant was summarily dismissed and so is not entitled to payment in lieu of notice.
35. Furthermore, the claim for payment for overtime over a period of 10 years is mis-conceived as the same was not proved to the satisfaction of the court. Furthermore, the claim would have been time barred by dint of section 90 of the *Employment Act* 2007 which mandates claims to be made within 3 years from the date when they occurred. It was incumbent on the Claimant to demonstrate, when



and how overtime was incurred against the Respondent. The court is also satisfied that the Claimant was a supervisor in his last years at work and therefore in management cadre and was not entitled to overtime in terms of the policy of the Respondent for payment of overtime.

36. With regard to the claim for service pay, the Claimant was under a proper pension scheme and did not demonstrate that he was entitled to payment of service pay over and above the pension payable to him upon summary dismissal. The claim is also dismissed for lack of merit.
37. In the final analysis the court finds the entire claim by the Claimant to be without merit and is dismissed.

Counter claim

38. The Respondent sought to have judgment against the Claimant in respect of outstanding loans totaling Kshs. 1,851,201.38 granted to the Claimant by the bank in his capacity as an employee of the Respondent. The Respondent submitted that the Claimant admitted to have not repaid the Kshs. 1,851,201.38 outstanding as of the date of his separation.
39. The court notes that other than the issue of preferential interest rate which was granted to the Claimant by virtue of his employment which in this matter was not raised by the Claimant, the court lacks jurisdiction to determine the repayment dispute of the loan after termination of employment which is an entirely commercial dispute.
40. Accordingly, the counter claim lack merit and is dismissed.
41. We recognize the 10 years' service given by the Claimant to the Respondent. Noting that the Claimant did not receive substantial benefits upon summary dismissal, we find this case appropriate for each party to bear their costs of the suit.

DATED AT NAIROBI THIS 3RD DAY OF APRIL 2025

Mathews Nduma

Judge

Appearance:

Mr. Mwangi for Claimant

Mr. Oloo for Respondent

Mr. Kemboi – Court Assistant

